means of assault must be proved. *Hext* v. *State,* 48 Tex. Crim. 576, 90 S. W. 43; *Wilson* v. *State,* 7 Ala. App. 66, 60 So. 983. Similarly, mere descriptive epithets cannot be rejected as surplusage, ever if they are introduced by a videlicet. *Walker* v. *State,* 73 Ala. 17; *Commonwealth* v. *McCarthy,* 145 Mass. 575, 14 N. E. 643. In *Walker* v. *State,* under an indictment for assault "with a weapon, to-wit, a gun," proof of assault with the hand or first only, shows a fatal variance. Likewise, in *Commonwealth* v. *McCarthy,* an allegation in an indictment that the defendant "wilfully did throw a certain missile, to-wit, a stone" was not sustained by proof that he threw only a billet of wood. Variances were held to be fatal in the following cases,—allegation of assault with axe, proof of assault with shovel, *Ferguson* v. *State,* 4 Tex. App. 156; allegation of assault with bois d'arc stick, proof of assault with picket, *McGrew* v. *State,* 19 Tex. App. 302; allegation of assault with knife, proof of assault with stick, *Herald* v. *State,* 37 Tex. Crim. 409, 35 S. W. 670; allegation of assault with bottle, proof of assault with glass, *Jones* v. *State* (Tex. Crim. App. 1901), 62 S. W. 758. On the other hand, under an indictment charging assault "with a deadly weapon, to-wit, a club," it was held that proof of the injuries received, without specification of the means used, sustained the indictment. *State* v. *Phillips,* 104 N. C. 786, 10 S. E. 463. And variances were held not to be fatal in the following cases, viz: allegation of assault with razor, proof of assault with pocket-knife, *Hall* v. *State,* 79 Ala. 34; allegation of assault with fist, proof of assault with hand, *Allen* v. *State,* 36 Tex. Crim. App. 436, 37 S. W. 738; allegation of striking with gun, proof of beating with stone, *Ryan* v. *State,* 52 Ind. 167. With the possible exception of the case last cited, the principal case goes further than any preceding case in holding that the variance is not fatal. In applying the doctrine of notice to the facts under consideration, the North Carolina court undoubtedly arrived at a commendable decision. A variance should not be fatal unless it appears to have resulted in unfair surprise. If, by reason of the descriptive allegations, the defendant had prepared to try one transaction, and the state then sought to try another, that would be such a case. If, on the other hand, the defendant has prepared to try the very transaction evidenced by the state, the fact that the defendant may have hoped to succeed by disproof of an immaterial allegation, should be considered irrelevant.

DAMAGES—EXEMPLARY DAMAGES AGAINST CORPORATION FOR TORT OF SERVANT.—In an action for damages for an assault and battery committed on the plaintiff by the servants and employees of the defendant corporation, *Held,* exemplary damages may be allowed against the corporation. *Indianapolis Bleaching Co.* v. *McMillan,* (Ind. App. 1916), 113 N. E. 1019.

The two propositions involved in this case, (1) as to whether exemplary damages may be recovered for an act that may be punishable as a crime, and (2) as to whether a corporation can be held liable in exemplary damages for the act of its servant, are questions about which there is great contrariety and confusion in the authorities. In the principal case the rule is laid down that examplary damages cannot be assessed in case of a wrong

the commission of which subjects the wrongdoer both to a criminal prosecution and a civil action. Cases in accord, are: *Murphy* v. *Hobbs,* 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366; *Huber* v. *Teuber,* 3 MacArthur 484, 36 Am. Rep. 110; *Albrecht* v. *Walker,* 73 Ill. 69; *Wabash Printing &c. Co.* v. *Crumrine,* 123 Ind. 89, 21 N. E. 904; *Austion* v. *Wilson,* 4 Cush, 273, 50 Am. Dec. 766; *Boyer* v. *Barr,* 8 Neb. 68, 30 Am. Rep. 814; *Fay* v. *Parker,* 53 N. H. 342, 16 Am. Rep. 270. Contra, *Brown* v. *Evans,* 17 Fed. 912; *Wilson* v. *Middleton,* 2 Cal. 54; *Brannon* v. *Silvermail,* 81 Ill. 434; *Hauser* v. *Griffith,* 102 Iowa 215, 71 N. W. 223; *Jockers* v. *Borgman,* 29 Kan. 109, 44 Am. Rep. 625; *Boetcher* v. *Staples,* 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295; *Barr* v. *Moore,* 87 Pa. St. 385, 30 Am. Rep. 367; *Cole* v. *Tucker,* 6 Tex. 266; *Edwards* v. *Leavitt,* 46 Vt. 126; *Brown* v. *Swineford,* 44 Wis. 282, 7 Cent. Law J. 208. But, argued the court in the principal case, the corporation is not exposed to a criminal prosecution, therefore exemplary damages may be allowed against a corporation for the assault of its agent, though the assault exposed the agent to a criminal prosecution. Among the cases in support of this doctrine there are, *L. N. A. & Chicago Ry. Co.* v. *Wolfe,* 128 Ind. 347, 27 N. E. 606, 25 Am. St. Rep. 436; *Goddard* v. *Grand Trunk Ry Co.,* 57 Me. 202, 2 Am. Rep. 309; *Singer Mfg. Co.* v. *Holdfodt,* 86 Ill. 455, 29 Am. Rep. 43; *Caldwell* v. *New Jersey Steamboat Co.,* 47 N. Y. 282; *Pittsburg &c. Ry Co.* v. *Slusser,* 19 Ohio St. 157. The rule has been unusually stringent against common carriers and especially railroad companies. *Lienkauf* v. *Morris,* 66 Ala. 406; *Goddard* v. *Grand Trunk Ry. Co.,* supra. However some of the strongest cases are contra, *Warner* v. *Southern Pac. Co.,* 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327; *Hagan* v. *Providence & Worcester R. R.,* 3 R. I. 88, 91; *L. S. & M. S. Ry. Co.* v. *Prentice,* 147 U. S. 101, 13 Sup. Ct. 261. For a comment on the case last cited and a sound criticism of the doctrine of allowing exemplary damages against corporations for the torts of their agents or servants see 7 HARV. L. REV. 45. But even these cases agree that puritive damages may be allowed against the principal if "the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed." See generally, 13 CYC. 114-118, 1 SEDGWICK, DAMAGES (8th Ed.) § 380.

DETERMINABLE FEES—CONSTRUCTION OF WILLS.—A testator, 82 years old when he made his will, and leaving, when he died, his wife, three daughters, and an unmarried son, devised the life income from his estate to his wife, to his son the remainder of his estate, after paying certain legacies to his daughters. The will provided that "in the event that any of my children should die without definite issue and before this will takes effect, then their respective share or shares * * * shall accrue to my surviving children, share and share alike." The son survived the testator, married, and died without issue (his wife surviving him) in the lifetime of his mother. *Held,* the son took only a base or determinable fee, and on his death without issue his share went to his surviving sisters. *Abrahams* v. *Sanders* (Ill. 1916), 113 N. E. 737.